Thor Eagle Maritime Agencies v Innovest Bhd

HIGH COURT (KUALA LUMPUR) — COMMERCIAL TRIAL NO D1–22–1807 OF 2001
HAMID SULTAN JC
1 JUNE 2009

Contract — Breach — Delay — Shipping contract — No term in contract provided time to be of essence — Delay in arrival of ship — Evidence of previous occasions of undisputed delay — Whether delay amounted to breach of contract

Contract — Damages — Mitigation — Whether plaintiff attempted to mitigate losses

Contract — Time — Time of essence — Shipping contract — Delay in arrival of ship — Whether time depends on terms of contract, intention of parties, custom, practice etc

Shipping and Navigation — Carriage of goods — Breach — Whether delay in arrival of ship at port of loading amounted to breach — Whether time of essence — Whether defendant had cancelled shipment — Whether vessel had to be ready for loading on agreed date

The plaintiff's claim against the defendant was for dead freight charges amounting to USD256,760 after deducting from the freight the sum of USD63,243 being costs the plaintiff would have to pay if the shipment had been effected. The contract of shipment stated that the time of shipment to be about 10–15 August 1998 ie the arrival of vessel. About one week before shipment the defendant informed its clear intention to repudiate the contract. The ship only arrived on 16 August 1998. The defendant in his defence claimed, inter alia: (1) that the defendant did not cancel the contract of shipment; (2) that time was essence of the contract and since the vessel did not berth before 15 August 1998, the plaintiff was in repudiatory breach of the contract entitling the defendant to rescind the contract; (3) that the plaintiff had failed to mitigate its losses; and (4) that in any event the award must not exceed USD80,000 being the sum proposed by the plaintiff at an early stage in view of an amicable settlement.

Held, allowing the plaintiff's claim with costs:

(1) The terms of the contract did not say the time was of essence. On the contrary it said 'about' 10–15 August 1998 as the date of arrival of the ship. There was also evidence that on the previous occasions, the defendant had loaded goods even though the vessel did not arrive on the schedule dates. It is trite that in contracts relating to shipping, time may not be essence and it all depends on the terms of the contract, intention of parties, custom, practice etc (see para 10(a)).

(2) The defendant had cancelled the shipment and there were no goods for the defendant to load. Once the defendant cancelled the said shipment contract the said vessel need not be ready to load on the agreed date (see para 10(b)).

(3) The plaintiff did not adduce evidence to show the losses were mitigated to reduce damages. However the plaintiff had made attempts to mitigate losses and more importantly the plaintiff had proposed a settlement sum of USD80,000 as full and final settlement of the plaintiff's claim. On the facts of the case it was just and equitable to assess damages to be the proposed sum of USD80,000 (see para 10(c)).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan ialah untuk tambang muatan tetap (*dead freight charges*) berjumlah USD256,760 selepas menolak pengangkutan sejumlah USD63,243 sebagai kos yang perlu dibayar oleh plaintif sekiranya penghantaran telahpun dibuat. Kontrak penghantaran menyatakan bahawa masa penghantaran ialah antara 10–15 Ogos 1998, iaitu ketibaan kapal tersebut. Lebih kurang seminggu sebelum penghantaran tersebut defendan memaklumkan tujuannya dengan jelas untuk membatalkan kontrak tersebut. Kapal tersebut hanya tiba pada 16 Ogos 1998. Defendan dalam pembelaannya mendakwa, antara lain: (1) bahawa defendan tidak membatalkan kontrak penghantaran; (2) bahawa masa merupakan intipati kontrak dan memandangkan kapal tersebut tidak berlabuh sebelum 15 Ogos 1998, plaintif yang di dalam perolakan pelanggaran kontrak yang memberi hak kepada defendan untuk membatalkan kontrak tersebut; (3) bahawa plaintif telah gagal untuk mengurangkan kerugiannya; dan (4) bahawa award tidak boleh melebihi USD80,000 sebagai jumlah yang dicadangkan oleh plaintif pada peringkat awal sebagai penyelesaian secara damai.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Terma-terma masa kontrak tidak menyatakan bahawa masa merupakan intipati kontrak. Sebaliknya ia menyatakan kira-kira 10 hingga 15 Ogos

1998 sebagai tarikh ketibaan kapal tersebut. Terdapat juga keterangan bahawa sebelum ini, defendan telah memuatkan barang-barang walaupun kapal tidak tiba pada tarikh yang dijadualkan. Nyata bahawa dalam kontrak berkenaan perkapalan, masa bukanlah intipati dan ia bergantung kepada terma-terma kontrak, tujuan pihak-pihak, kebiasaan, amalan dan lain-lain (lihat perenggan 10(a)).

(2) Defendan telah membatalkan penghantaran tersebut dan tiada barang-barang untuk dimuatkan oleh defendan. Apabila defendan membatalkan kontrak penghantaran tersebut maka kapal tersebut tidak perlu sedia untuk dimuatkan pada tarikh yang dijanjikan (lihat perenggan 10(b)).

(3) Plaintif tidak mengemukakan keterangan untuk menunjukkan kerugian tersebut telah dikurangkan untuk mengurangkan ganti rugi. Walau bagaimanapun plaintif telah membuat cubaan untuk mengurangkan kerugian dan yang lebih penting lagi, plaintif telah mencadangkan jumlah penyelesaian USD80,000 sebagai penyelesaian penuh dan muktamad terhadap tuntutan plaintif. Berdasarkan fakta kes ini maka adalah adil dan saksama untuk menilai ganti rugi untuk menjadi jumlah USD80,000 sepertimana dicadangkan (lihat perenggan 10(c)).]

Notes

For a case on breach of carriage of goods, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1414.

For cases on delay, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2619–2622.

For cases on mitigation, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3359–3376.

For cases on time of the essence, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5432–5441.

Cases referred to

Abang Hj Jaya bin Datu Bentara v Chee Kian Sian [1954] SCR 12, SC (refd)
Mihalis Angelos [1971] 1 QB 164, CA (refd)
Ng Neoh Ha & Ors v Maniam & Ors [1994] 1 MLJ 434, HC (refd)
Ramayee Gengan & Ors v Tan Yik Kok & Anor [1983] 1 CLJ 326, HC (refd)
Tan Song Gou v Goh Ya Tian [1983] MLJ 60, CA (refd)
'The Reunion'; Uni-Ocean Lines Pte Ltd v Kamal Sood t/a Toshiba Kamal Enterprise [1983] 2 MLJ 189, HC (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4, HC (refd)

KM Tan (KM Tan & Tee) for the plaintiff.
Sandosh Anandan (Sandosh Anan) for the defendant.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's claim against the second defendant for dead freight charges amounting to USD256,760 after deducting from the freight, the sum of USD63,243 being costs the plaintiff would have to pay if the shipment had been effected. This matter was part heard before a different judge. Both parties have consented for this matter to continue before me and pronounce the judgment.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (a) witness statement for examination-in-chief; (b) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (c) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS

[3] The plaintiff's claim against the defendant is for dead freight which is freight for shipment of cargo as per contract but not shipped, less mitigating of costs of shipment and ancillary expenses which was not spent. The contract of shipment referred to as 'conline booking' stated that the time of shipment to be about 10–15 August 1998 ie the arrival of vessel. Evidence was given to show that about one week before shipment the defendant has informed its clear intention to repudiate the contract. The ship only arrived on 16 August 1998. The defendant did not perform as contracted. The defendant in his defence says that they did not cancel the said contract of shipment and asserts the time was essence of the contract and says as the vessel did not berth before 15 August 1998 the plaintiff was in repudiatory breach of the contract and the defendant is entitled to rescind the contract. And also alleges the plaintiff has failed to mitigate its losses. And in the submission says that in the event the court finds the defendant liable then the award must not exceed USD80,000 a sum proposed by the plaintiff at an early stage in view of an amicable settlement.

PRELIMINARIES

[4] Three witnesses gave evidence for the plaintiff. The defendant did not

give evidence. However the defendant's counsel had informed the court that their main witness had been subpoenaed by the plaintiff who gave evidence as PW1. And the previous judge had given permission for the defendant to call him also as defendant witness after the plaintiff had closed their case. Both parties had agreed in lieu of calling again PW1 as the defendant's witness the defendant be liberty to recall PW1 before the close of plaintiff's case, which the defendant did. At the close of the plaintiff's case the defendant informed court that the defendant is not going to give evidence and will like to submit no case to answer. I had immediately cautioned the defendant the danger of doing so.

THE JURISPRUDENCE RELATING TO NO CASE TO ANSWER

[5] In *Abang Hj Jaya bin Datu Benteral v Chee Kian Sian* [1954] SCR 12 the court opined that when magistrates are adjudicating in civil cases they should normally follow the practice approved in English civil cases of not ruling that there is no case to answer until the defence have made their election whether they will call evidence.

[6] If the defence elects to give evidence, that evidence should first be heard. A distinction should be borne in mind between a case where at the close of the plaintiff's evidence the judge is asked to rule as a matter of law that the plaintiff has failed to establish his case, and a case where at the close of the plaintiff's case the judge is asked to rule that the evidence is insufficient to support it. In *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 Sinnathuray J observed:

> On the subject of no case to answer, a summary of the practice of the Court of England is to be found in the *White Book* at 35/7/2. The last time the practice, was judicially considered is in the Court of Appeal decision *Storey v Storey*.
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> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case, there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.
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> In my judgment, it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiffs case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. It is trite to say that we have a young legal profession and a fused one. Most are small practitioners and engage in many fields of law. The time and effort put in litigation matters are diffused. Such a practice therefore will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing. Altogether, the practice will bring about a saving of costs for the parties.

[7] In contrast to *UN Pandey*, the Singapore Court of Appeal in *Tan Song Gou v Goh Ya Tian* [1983] MLJ 60 stated that the proper practice, if counsel for defendant wishes to make a submission of no case to answer, is for the judge to refuse to rule on it unless counsel elects to call no evidence.

[8] In *Ramayee Gengan & Ors v Tan Yik Kok & Anor* [1983] 1 CLJ 326 on the issue of no case to answer, Mohd Dzaiddin J (as he then was) observed:

> Counsel for the defendants then informed the court that he would submit there was 'no case to answer'. Before deciding whether to accept his request, I reminded counsel of the election available to the defence and that his case would stand or fall on his submission of 'no case to answer'. Counsel indicated that he would abide by such decision.
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> In allowing counsel's application, I relied on the English practice. In the *Supreme Court Practice 1979*, Vol 1, p 571, under heading 'No Case to Answer', it is stated as follows:
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> > As to the inconvenience of asking a judge sitting alone to hold that there is no case to answer at the conclusion of the evidence of the party on whom the onus lies, see *Alexander v Rayson* [1936] 1 KB 169. The judge should generally refuse to rule on such a submission by the defendant unless he makes it clear that the does not intend to call evidence (*Laurie v Raglan Co* [1942] 1 KB 152 (CA)) but the judge is not bound so to refuse, and if he does not put the party to his election whether to call evidence or not, the latter retains his right to call it if his submission fails (*Young v Rank* [1950] 2 KB 510; *Storey v Storey* [1961] P 63 (CA)). A submission of no case may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the court should hold that the burden has not been discharged (*ibid* and *Yuill v Yuill* [1945] P 15).
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> In addition to the *White Book*, I also rely on the decision of Thomson CJ (as he then was) in *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239 at p 241 (CA). At p 241, he stated as follows:
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> > Having come to that conclusion the question then arises what this court should do in view of the course taken at the trial by counsel for the defendants when he submitted that there was no case to answer.
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> It is a great pity that when this submission was made the advice of Goddard LJ (as he then was) in the case of *Parry v Aluminium Corporation, Ltd* was disregarded. His Lordship then observed that in cases of negligence if a judge is to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again (*Laurie v Raglan Building Co Ltd*; *Yuill v Yuill*; *Storey v Storey*).

[9] If there are more than one defendants and not all of the defendants submit no case to answer, in such circumstances the court ought to reject the submission of no case to answer and proceed to hear the evidence of other defendants before the court arrives at a decision (see *Ng Neoh Ha & Ors v Maniam & Ors* [1994] 1 MLJ 434).

[10] I have heard the evidence, read the notes of proceeding, witness statement, documents submission etc in detail. I do not wish to deal with the evidence and submission in detail as parties have adequately dealt with it in their submissions. I take the view that the plaintiff's claim must be allowed partly. My reasons are as follows:

(a) I reject the contention of the defendant that as per the terms of the contract time is of essence of the contract. In the instant case the contract does not say so. On the contrary it says 'about' 10–15 August 1998 as the date of arrival of the ship. There was also evidence led through PW1 that on the previous occasions, the defendant has loaded goods even though the vessel did not arrive on the schedule dates. It is trite that in contracts relating to shipping, time may not be essence and it all depends on the terms of the contract, intention of parties, custom, practice etc. In the *Mihalis Angelos* [1971] 1 QB 164 Edmund Davies LJ and Megaw LJ observed:

> It is not disputed that when a charter includes the words 'expected ready to load ...' a contractual obligation on the part of the shipowner is involved. It is not an obligation that the vessel will be ready to load on the stated date, nor about the stated date, if the date is qualified, as here, by 'about'. The owner is not in breach merely because the vessel arrives much later, or indeed does not arrive at all. The owner is not undertaking that there will be no unexpected delay. But he is undertaking that he honestly and on reasonable grounds believes, at the time of the contract, that the date names is the date when the vessel will be ready to load. Therefore in order to establish a breach of that obligation the charterer has the burden to showing that the owner's contractually expressed expectation was not his honest expectation, or, at the least, that the owner did not have reasonable grounds for it.

(b) In the instant case there was also evidence led by the plaintiff to show that the defendant had cancelled the shipment and there were no goods for the defendant to load. There is much merit in the plaintiff's contention that once the defendant cancelled the said shipment contract the said vessel need not be ready to load on the agreed date. Support for the proposition is found in the case of *'The Reunion';*

Uni-Ocean Lines Pte Ltd v Kamal Sood t/a Toshiba Kamal Enterprise [1983] 2 MLJ 189 where it was stated:

> Once the defendant had repudiated the charterparty and had evince an intention that she no longer would ship on the plaintiff's vessel, the plaintiff need not proceed to be ready on January 25...

(c) As the plaintiff says that the defendant has cancelled the contract then there will be a duty in law to mitigate losses and damages to that extent have to be reduced. The plaintiff did not adduce evidence to show the losses were in fact mitigated to reduce damages. However there is unrebutted evidence and the fact that the plaintiff had made attempts to mitigate losses and more importantly the plaintiff had proposed a settlement sum of USD80,000 as full and final settlement of the plaintiff's claim. On the facts of the case I think it will be just and equitable to assess damages to be the proposed sum of USD80,000 taking into consideration the fact that there was no clear evidence of payment by the plaintiff to the ship owner etc and/or account thereof.

[11] For reasons stated above, I allow the plaintiff's claim for the sum of USD80,000 the equivalent in Malaysian ringgit following the current rate of exchange at the date of the judgment with interest at 8%pa from the judgment sum from the date of filling of the writ until the date of realisation with costs. The getting up fees shall not exceed RM30,000. If costs cannot be agreed the plaintiff is at liberty to tax costs.

[12] I hereby order so.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum